

CHAPTER 12 – BAIL

STATUTORY REFERENCES: **RSA 173-B:9 (Violation of Protective Orders; Penalty)**
 RSA 597 (Bail and Recognizance)
 RSA 597:2 (Release of Defendant Pending Trial)
 RSA 21-M(k) (Rights of Victims of Crime)

A. BAIL FORMS

PROTOCOL 12-1

AOC Form-109-245 entitled Orders and Conditions of Bail must be used for issuing bail. These forms may not be modified and must be used in all criminal cases. The new bail form explicitly addresses restrictions on personal contact, possession of firearms, and use of alcohol and drugs.

COMMENT

The old short-form Bail Order should never be used by itself. Clerks of Court shall monitor the correct use of these forms by the bail commissioners and promptly address any failure to use the forms properly.

PROTOCOL 12-2

Where there is a protective order, the bail order should duplicate the conditions of the protective order, and not simply incorporate them by reference.

NOTE: Incorporation by reference of the protective order will not provide conditions of bail that survive in the event the petition is withdrawn.

B. GUIDELINES FOR DETERMINING BAIL PENDING ARRAIGNMENT

INTRODUCTION

In general, a person is entitled to pretrial release, the conditions of which will be dependent upon the court's assessment of whether the defendant poses a risk of flight or danger to another. Pursuant to RSA 597:2, VI, if the charge is a class B misdemeanor, the court shall order that, pending arraignment, the person be released on his/her own recognizance, unless the court determines that such a release will endanger any person in the community.

1. Bail Without an Underlying Protective Order

PROTOCOL 12-3

RSA 597:2, III-a specifically authorizes the court or bail commissioner to order preventive detention without bail, or to impose alternative restrictive conditions such as electronic monitoring, in cases involving domestic violence related offenses, where there is clear and convincing evidence that the defendant poses a danger to another.

COMMENT

RSA 597:2 has recently been amended to encourage a deeper assessment and analysis of whether or not the defendant in a domestic violence case poses a danger. The statute lists seven examples of conduct to be considered by the court as evidence that the defendant poses a danger. They are:

- a. Threats of suicide;
- b. Acute depression;
- c. History of violating protective orders;
- d. Possessing or attempting to possess a deadly weapon in violation of an order;
- e. Death threats or threats of possessiveness toward another;
- f. Stalking; and
- g. Cruelty to or violence directed towards pets.

Research has shown that each of these listed factors may be a strong indicator of

lethality or future violence.

Other risk factors that have been identified by the Domestic Violence Fatality Review Committee of the Governor's Commission on Domestic and Sexual Violence that the court may want to consider are:

- a. Escalation of physical violence;
- b. Escalation of other forms of abuse;
- c. Sexual abuse of the victim;
- d. Recent acquisition or change in use of weapons;
- e. Suicidal ideation, threats or attempts;
- f. Homicidal ideation, threats or attempts;
- g. Change in alcohol or other drug use/abuse;
- h. Stalking or other surveillance/monitoring behavior;
- i. Centrality of the victim to the perpetrator ("he/she's all I have");
- j. Jealousy/obsessiveness about, or preoccupation with, the victim;
- k. Mental health concerns connected with violent behavior;
- l. Other criminal behavior or injunctions (e.g., resisting arrest);
- m. Increase in personal risk taking (e.g., violation of restraining orders);
- n. Interference with the victim's help-seeking attempts (e.g., pulling a phone jack out of the wall);
- o. Imprisonment of the victim in the home;
- p. Symbolic violence including destruction of the victim's property or harming pets;
- q. The victim's attempt to flee the batterer or to terminate the relationship;
- r. Batterer's access to the victim or the victim's family;
- s. Pending separation, divorce or custody proceedings;
- t. Recent termination from employment; and,
- u. Other suspected risk factor(s).

PROTOCOL 12-4

When determining bail in domestic violence cases, the judge or bail commissioner shall talk with the representative from the arresting agency to make an assessment about the nature of the case. Specifically, inquiry should be made as to the facts of the case, including relationship of the parties, current charges and information from the scene.

PROTOCOL 12-5

Whenever possible, the prosecuting agency should be asked to provide a hard copy of the defendant's criminal record including: criminal history of the defendant, including NH criminal record check; NH license check; motor vehicle history; domestic violence restraining order history, if known; Triple I check (interstate); and FBI criminal check.

2. Bail When Arrest is for the Violation of a Domestic Violence Protective Order (Mandatory Detention-Violation of a Domestic Violence Protective Order)

COMMENT

This section applies to Bail Commissioners.

PROTOCOL 12-6

In cases brought before a bail commissioner which allege a violation of RSA 173-B protective orders, the defendant **must be detained until arraignment**, pursuant to RSA 173-B:9, I(a). It is not necessary for the bail commissioner to write a bail order in these cases.

NOTE: The bail commissioner should remind the law enforcement agency to contact the clerk of court for arraignment.

PROTOCOL 12-7

Preventive detention at the time of arrest may be authorized by a bail commissioner if there has been a domestic violence-related criminal matter, i.e., where a person is charged with any offense listed in RSA 173-B:I (assault, reckless conduct, criminal threatening, sexual assault, interference with freedom, destruction of property, unauthorized entry, or harassment).

C. BAIL CONSIDERATIONS AT ARRAIGNMENT

PROTOCOL 12-8

At the time of arraignment, each judge must review the commissioner's form prior to setting bail. Modifications to the commissioner's orders should be noted on the original and new copy given to the defendant. If modifications are significant, a new bail form should be issued. If after review the judge determines that no modifications are necessary, then a notation on the back of the criminal complaint may be made that the bail conditions are being continued.

COMMENT

In addition to the general criteria that have been used in determining whether or not the defendant should be released, the court should refer to the factors listed in RSA 597:2 (see Protocol 12-3).

PROTOCOL 12-9

The judge should make a note on the back of the complaint whether the record was presented. In any event, the court should require the police to at least make an oral presentation of the defendant's criminal record. This offer of proof should be accompanied by an affidavit (known as a Gerstein affidavit) where the defendant was arrested without a warrant. (Gerstein v. Pugh, 420 U.S. 103 (1975).) In domestic violence-related criminal cases, all courts must perform a search of their own records to determine the existence of any current or expired domestic violence restraining orders that may be relevant to the inquiry on the issue of safety or preventive detention and to guarantee that any outstanding orders are consistent in their terms.

PROTOCOL 12-10

Preventive detention without bail *may* be ordered by the court at arraignment in the following circumstances:

- a. If there has been a violation of a domestic violence protective order issued pursuant to RSA 173-B or RSA 458:16, III, and there is clear and convincing evidence the person poses a danger to another; or
- b. If there has been a domestic violence-related criminal matter, i.e. where a person is charged with any offense listed in RSA 173-B:1, I (assault, reckless conduct, criminal threatening, sexual assault, interference with freedom, destruction of property, unauthorized entry, or harassment).

COMMENT

Judges are reminded that it may be appropriate to grant a civil protective order even if a defendant is held without bail, because of the different protection available under an order issued pursuant to RSA 173-B.

PROTOCOL 12-11

After a determination of dangerousness, the court must assess the recidivism risk by inquiring about past violation of domestic violence orders or related offenses.

PROTOCOL 12-12

The court must also assess the risk of flight by inquiring about attachment to the community and residential history.

PROTOCOL 12-13

In the alternative to preventive detention the court may order restrictive conditions including, but not limited to, electronic monitoring and supervision.

COMMENT

Electronic monitoring is not available in all sections of the state. It is generally coordinated by the Department of Corrections, Probation and Parole, at a cost to the defendant. Before imposing electronic monitoring as a condition of release, the court should obtain assurances from the Department of Corrections that such monitoring is available.

PROTOCOL 12-14

In a domestic violence-related criminal case, the court should routinely issue an appropriate weapons relinquishment order as a condition of bail.

PROTOCOL 12-15

In any domestic violence related criminal case, the court shall include, as a condition of any bail order, a prohibition against purchasing or obtaining any firearms.

D. BAIL PENDING APPEAL

PROTOCOL 12-16

When a person has been found guilty of a misdemeanor in the district court and is either awaiting imposition of the sentence or has filed a de novo appeal, the court must reconsider bail in compliance with RSA 597:1. The same considerations set forth in Section C: Protocols 12-8 through 12-15 should be followed.

E. VICTIM NOTIFICATION OF BAIL ORDERS

PROTOCOL 12-17

When making bail orders in domestic violence cases, courts should address the issue of victim notification with the prosecutor at the arraignment in order to guarantee that proper notification is made.

COMMENT

It is important that victims of domestic violence be made aware of all outstanding orders for protection, including bail orders. Since the court system is often not aware of the victim's location, the prosecuting agency is the most likely contact point.